Supreme Court, U.S.
FILED
APR 26 1993
OFFICE OF THE CLERK

No. 92-1580

In The

Supreme Court of the United States

October Term, 1992

COATS COMPANY,

Petitioner,

vs.

SCOTT CANTRELL,

Respondent.

On Petition For Writ Of Certiorari To The Texas Court Of Appeals For The Twelfth District

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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The Texas Court of Appeals for the Twelfth District issued its decision on March 31, 1992. Scott Cantrell, Respondent, files this Brief in Opposition to the Petition for Writ of Certiorari filed by The Coats Company, a division of Hennessy Industries, Inc., a subsidiary of Danaher Corporation. Mr. Cantrell asks the Court to deny Coats' Petition for Writ of Certiorari to the Court of Appeals for the Twelfth District of Texas.

STATEMENT OF THE CASE

I. Federal Question or Constitutional Issue not Raised Below

The Coats Company ("Coats") petitions this Court for writ of certiorari on the grounds that the Twelfth District Court of Appeals of the State of Texas violated Coats' right to be free from deprivation of property without due process of law guaranteed in the Fourteenth Amendment to the United States Constitution. The alleged due process violation consists of an opinion by the Tyler Court of Appeals reversing the trial court's improper order limiting discovery in a manner inconsistent with the Texas Rules of Civil Procedure and the opinions of the Texas Supreme Court. Because Coats is unhappy with the result in the Tyler Court of Appeals and the Supreme Court of Texas' denial of its Application for Writ of Error, it seeks review in this Court of a matter which encompasses only Texas procedural rules governing the discovery process.

Coats argues that the purported federal question or constitutional issue was properly presented to the Texas Supreme Court in application for writ of error following the rendition of judgment by the court of appeals. Coats complains of two matters in the court of appeals opinion: 1) that the opinion was so arbitrary, capricious and unfair that it will require Coats to expend further attorney's fees and expenses, thus depriving Coats of property without due process of law; and 2) that the Twelfth District Court of Appeals violated the laws of the State of Texas by issuing an opinion in which only one justice participated.

A. Due process not raised below.

Coats' due process argument was not raised in the Texas Supreme Court on appeal from the Twelfth District Court of Appeals. At page 4 of its petition, Coats asserts that the vehemence of its disagreement with the Texas court of appeals constituted an assertion of its more recently contrived due process argument. As a matter of fact, its deprivation of property argument was neither expressly raised nor raised by "clear intendment."

In essence, Coats asserts that the error committed by the court of appeals was so egregious that it constituted a per se due process violation which should have been obvious to the Texas Supreme Court without the need for express presentation for the higher court's review. Contrary to Coats' position, the Texas Supreme Court never received an opportunity to rule on the due process question. Coats' argument to the contrary stretches the meaning of the term "clear intendment" beyond imagination. As was clearly stated by this Court in *Street v. New York*, an opinion cited by Petitioner, this Court does not have power to consider a question of the constitutionality of a state statute or action unless the question was presented to a court in that state. *Street v. New York*, 394 U.S. 576 (1969). In its Petition, Coats failed to cite the portion of *Street* which states that the constitutionality question must be "brought to the attention of the state court *with fair precision and in due time.*" (emphasis added) *Id.* at 584.

In *Street*, the petitioner complained of the unconstitutionality of a New York statute. He had raised that question *expressly* in the trial court by motion and in both state courts of appeals in briefs. *Id.* at 579. Coats' complaint in

the Texas Supreme Court was totally silent as to the Fourteenth Amendment to the U. S. Constitution. At Page 4 of its Petition, it cited the part of its application to the Texas Supreme Court which it believed raised the federal question by clear intendment. As is obvious from that excerpt, Coats merely complained about a discovery ruling in the Texas Supreme Court. It did not complain, either expressly, impliedly or by clear intendment, about a violation of its rights under the U. S. Constitution. In fact, the due process argument asserted before this Court is merely a last ditch effort to complain about an opinion of a Texas court of appeals on an issue involving Texas procedural rules.

B. Participation in court of appeals not raised below.

In its Petition to this court, Coats totally ignores its failure to raise the court of appeals' participation argument in the Texas Supreme Court. Presumably Coats' position is that the alleged failure of the court of appeals to follow Texas statutes was also such an obvious error that the Texas Supreme Court should have anticipated Coats' position and complaint without the necessity of that position being raised in its application for writ of error. That argument is totally untenable, especially in light of the fact that such a due process argument would have been preserved in every opinion handed down by the Tyler Court of Appeals in a manner consistent with the one in this case. That result would be absurd.

Coats' complaint regarding the procedural defect committed in the Twelfth District Court of Appeals opinion was never raised before any court before it was asserted to this Court in Coats' Petition for Writ of Certiorari. Even if the court of appeals' opinion did reflect a fatal defect created by the lack of a majority of the justices of that court (an argument which Respondent adamantly denies), such a matter would necessarily be more appropriately submitted to the Texas Supreme Court for an opinion regarding Texas statutes and the practices of a Texas court of appeals.

C. Alleged non-federal ground.

Coats also suggests, in the alternative, that if no federal question was properly raised in the state courts below, the state supreme court's decision rests on a non-federal ground without any fair or substantial support. Coats cites *National Association for the Advancement of Colored People v. Alabama*, 357 U.S. 449 (1958), as support for that argument. That case does not provide support for Coats' meager attempt to conjure jurisdiction in this Court. Unlike *NAACP v. Alabama*, the case at bar contains no federal question which was presented to the Texas Supreme Court. Cantrell does not rely on a non-federal argument to prevent this Court from deciding a federal question. On the contrary, no federal question was ever raised below.

Because neither of the complaints raised by Coats in its Petition for Writ of Certiorari have been raised in the courts of the State of Texas, this Court does not have jurisdiction to review the judgment of the court of

appeals or the denial of writ of error by the Texas Supreme Court. Those decisions are not reviewable by this Court, and Coats' Petition for Writ of Certiorari should be denied.

II. Coats' Mischaracterization of the Material Facts.

Coats spends some considerable effort in its Petition reciting all of the discovery conducted in preparation for trial of this case (Petition for Writ of Certiorari 7-8; 13-15). Coats ignores, however, the clear limitation imposed by the trial court in response to Cantrell's attempts to discover safety devices on a machine similar to the defective product which formed the basis of Cantrell's claims. At trial Cantrell sought discovery of design problems in safety devices for the predecessor models to the model 40.40A tire changing machine, which predecessors included the 10.10A, 20.20A, 30.30A and 30.40A. Cantrell also requested the same information regarding Coats' European-style machines. Coats objected that Cantrell's discovery requests concerning the predecessor models to the 40.40A and the European-style machine were beyond the scope of discovery because only the model 40.40A was involved in the explosion. The trial court sustained Coats' objections and limited discovery to the model 40.40A tire changing machine. Coats fails to disclose to this Court that Coats' position at trial was that the court's discovery order limited discovery to the model 40.40A tire changing machines. Coats' objection was that discovery should be limited to the model 40.40A machine. The court's order on Coats' motion for protection limited production to documents "regarding the Coats' model

40.40A tire changer manufactured from 1978 through 1983."

During pretrial, when the trial court was considering Coats' motion in limine, Scott Davis, an attorney for Coats, presented paragraph 9 of the motion. Paragraph 9 sought to exclude "any reference to any model or type of tire changing machine manufactured by the Defendant other than the Coats 40.40A or the Coats 40.40SA." Scott Davis stated to the trial court: "No. 9 is basically a furtherance of the protective order that the court entered previously." The trial judge responded: "Well, I think in the protective order I limited it to this particular model machine." Later, in its response to Cantrell's motion for new trial, the attorneys for Coats stated that at the discovery hearing, the trial court "sustained the Defendant's objections to the production of certain documents pertaining to the predecessor models of the 40.40A and European-style tire changers." Despite fifteen months of active pretrial discovery, the trial court prevented Cantrell from the discovery of information which was crucial to his case against Coats.

The court of appeals' reliance upon *Jampole v. Touche*, 673 S.W.2d 569 (Tex. 1984), was proper and led to the correct result in this case. By persuading the trial court to limit discovery in this case to the 40.40A only, Coats was able to withhold from Cantrell extensive work which Coats did on various inflation safety devices in the period from 1975 to 1978. Coats only produced documents regarding safety devices that were dated after 1978 when the model 40.40A was manufactured. One of Coats' main

arguments at trial was that no safety device was developed until 1987. The undisclosed documents would have been most persuasive that such inflation devices were feasible some ten years earlier. Relying on the trial court's erroneous discovery ruling, Coats withheld all of the information and documents listed above. Cantrell uncovered these documents through his own limited sources. Cantrell was thus prevented from rebutting Coats' evidence at trial concerning the frequency of tire explosion incidents.

By asserting that Cantrell was permitted to offer evidence of alternative safety devices and engage in discovery regarding those devices, Coats ignores the severe limitation placed on Cantrell by the court's protective order and the crippling effect of that order on Cantrell's ability to demonstrate the feasibility of effective safety devices at the time the 40.40A was manufactured.

As demonstrated by Cantrell and concluded by the court of appeals, the trial was not fair to both parties. The jury was deprived of evidence that Coats had withheld from discovery regarding feasible safety devices on its pre 40.40A and European-style machines.

ARGUMENT FOR DENYING THE COATS COMPANY'S PETITION

I.

The decision of the court of appeals was a carefully considered and well reasoned opinion which clearly included review of the entire record on appeal.

Consistent with the Texas Supreme Court opinion in *Jampole v. Touche,* the court of appeals reached a decision which was neither arbitrary nor unfair to Coats. *Jampole v. Touche,* 673 S.W.2d 569 (Tex. 84). *Jampole* was a products liability action in which the plaintiff complained that an automobile manufactured by General Motors Corporation was unreasonably dangerous. The plaintiff complained of the trial court's order limiting discovery to knowledge and information based on records pertaining to a particular series of automobiles, 1971-1977 Vegas and Astros. The vehicle complained of was a 1976 Vega. The plaintiffs claimed that the 1976 Vega was defective because the fuel tank design allowed fuel to escape. The Texas Supreme Court held that the trial court took an unduly restrictive view "of the degree of similarity necessary for tests of other vehicles to be relevant." *Jampole,* 673 S.W.2d at 573. The court held that whether a safer system in one auto was adaptable to another was a question for the trier of fact and not one to be decided in discovery. *Id.* at 574.

Consistent with *Jampole,* the court of appeals concluded that Cantrell should have been permitted to discover evidence of safety devices on tire changing machines similar to the Coats model 40.40A. As discussed above, despite the discovery which did take place in this trial, a large amount of crucial evidence was withheld by Coats using the trial court's order as a shield. The trial court's order obviously limited Cantrell to discovery of safety devices manufactured beginning in 1978 and pertaining to the model 40.40A only. This prevented Cantrell from discovery of much of the information regarding Coats' predecessor models and the European-style machine which Cantrell unearthed from sources other

than Coats. Much of the information which Cantrell's attorneys found other places was not admitted by the trial court or was not discovered until after the trial.

At page 14 of its Petition, Coats asserts that the trial court's order did not expressly limit discovery but rather required production of documents and things. Such a position is comical when cast against the background of Cantrell's discovery requests which were much broader than the court's order, an order entered in response to Coats' Motion for Protective Order. The order completely ignored information later found by Cantrell regarding devices known to Coats prior to 1978 which were obviously feasible at that time.

Contrary to Coats' argument at page 15 of its petition, the European-style machine and predecessor models to the 40.40A were all similar with regard to the air inflation system. The trial court's pretrial order did preclude Cantrell from obtaining discovery of alternative safety devices. The order specifically prevented Cantrell from discovery of devices other than those on the model 40.40A beginning in 1978. Much of the evidence offered and excluded at trial was uncovered by Cantrell on his own and does not support Coats' assertion that no discovery limitation existed.

Despite Coats' frustration with the court of appeals' opinion, it does not constitute a violation of Coats' protection against deprivation of property without due process of law. The court of appeals properly interpreted Texas procedural rules of discovery consistent with previous Texas Supreme Court opinions, and its decision did

not violate principles of fundamental fairness in a manner inconsistent with the Fourteenth Amendment to the United States Constitution. There was a substantial basis for the court of appeals' opinion, and that opinion should be allowed to stand.

II.

Coats also complains about the court of appeals' opinion on the grounds that it was rendered by one justice in violation of the Texas Constitution, Texas statutes and the Texas Rules of Appellate Procedure. Based on that assertion, Coats argues that the court deprived it of due process by rendering an opinion in which only one justice participated.

Coats incorrectly relies on Texas Rule of Appellate Procedure 90(b) which requires the notation of the names of justices participating in a decision rendered by a *panel* of a Texas court of appeals. As noted by Coats in its petition, Texas Government Code Section 22.222(a) provides for rendition of court of appeals' opinions with the courts sitting in panels of three justices. A portion of Texas Rule of Appellate Procedure 90 relied on by Coats involves a written opinion or order handed down by a panel. The Twelfth District Court of Appeals sitting at Tyler, Texas, did not render its opinion in this case while sitting as a panel. As set out in Texas Government Code Section 22.216(1), the Twelfth District Court of Appeals consists of only three justices. Unlike the Fifth District Court of Appeals in Dallas which consists of thirteen judges, the Twelfth District Court of Appeals has never rendered any decision as a "panel," because it consists of

only three justices. As a result, the notation of names required by Texas Rule of Appellate Procedure 90(b) does not apply to the Tyler Court of Appeals.

Consistent with the custom and practice of all of the courts of the State of Texas, written opinions signed by a justice for the court do not include a notation of the names of all judges or justices participating. Those opinions do contain a notation of any judges or justices who do not participate. The notation that Justice Colley did not participate in the court of appeals' opinion in question further belies Coats' argument that only one judge participated. As is obvious from the court's opinion at page 5, Justice Colley is the only justice who did not participate in that opinion. Justice Bass signed the opinion for the court which was duly rendered by the majority of that court necessary to hand down a decision.

Despite Coats' assertion that the Tyler Court of Appeals has engaged in a pattern of abuse by rendering thirty-five of forty-two 1992 opinions with only one justice participating, the opinion of that court in this case was an opinion handed down by a majority of the entire court and signed on behalf of the court by Justice Bass.

Coats also points to two of the opinions of the Twelfth Court of Appeals which it claims bear a notation that all three judges participated. Apparently, Coats argues that the only opinions properly handed down by that court in 1992 were the two with all three names and the ones rendered per curiam. That position is patently ridiculous. The Appendix to this response contains certified copies of the two opinions referred to by Coats. The opinions clearly bear the names of less than all three

justices without a reference to any abstaining justice. Although the official reporter for the State of Texas (the apparent source of Coats' appendix pp. 47a-61a) bears the names of all three justices, the court's original opinions were handed down in the same form as the opinion in *Cantrell v. Hennessey Industries, Inc.*, 829 S.W.2d 875 (Tex. App. – Tyler 1992, writ denied). The absence of a notation concerning Chief Justice Ramey does not infer or imply that he did not participate in the *Cantrell* decision.

CONCLUSION

The Twelfth District Court of Appeals for the State of Texas rendered a decision consistent with the Texas Rules of Civil Procedure governing discovery and prior opinions of the Texas Supreme Court. The Texas Supreme Court reviewed the decision of the court of appeals and denied Coats' application for writ of error. Two appellate courts of the State of Texas have reviewed the trial court's discovery ruling and found it to be inconsistent with the laws of the State of Texas. No court in the State of Texas has had the opportunity to review Coats' lately contrived and flawed argument that the court of appeals' opinion violates due process and fundamental fairness and that the court of appeals illegally and improperly rendered a decision with the participation of only one justice. The decision of the court of appeals was neither arbitrary, capricious nor erroneous, and Coats was afforded all of its rights under the constitutions of Texas and the United States.

This Court does not have jurisdiction to rule on the complaints raised by Coats in its Petition for Writ of Certiorari. In light of that lack of jurisdiction and based on proper application of Texas law by the Twelfth District Court of Appeals, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari filed by The Coats Company.

Dated this 26th day of April, 1993.

Respectfully submitted,

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APPENDIX

NO. 12-89-00305-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

KEN GILBERT, D/B/A/ TYLER ARMATURE WORKS, APPELLANT	§	*APPEAL FROM THE COUNTY*
	§	
	§	*COURT AT LAW, NO. 2*
V.	§	*SMITH COUNTY, TEXAS*
	§	
BROWNELL ELECTRO, APPELLEE	§	
	§	

This is an appeal from a denial of a motion to set aside or vacate a default judgment and to grant a new trial. Gilbert failed to answer in the underlying lawsuit and now claims that he was entitled to a new trial under the test set out in ***Craddock v. Sunshine Bus Lines,*** 133 S.W.2d 124, 126 (Tex. 1939). We find that the trial court did not abuse its discretion in denying Gilbert's equitable motion for new trial. Accordingly, we affirm the trial court's judgment.

Appellee Brownell Electro, plaintiffs in the trial court, sued Gilbert, doing business as Tyler Armature Works, in Gilbert's individual capacity for a debt resulting from the purchase of merchandise. After Gilbert failed to answer, the trial court granted Brownell a default judgment against him in the amount of $9,247.28 for the debt, and $3,082.43 in attorney's fees. Gilbert thereafter timely filed his motion for new trial, along

with a sworn affidavit setting out the circumstances that allegedly entitled him to a new trial, and to have the default judgment set aside. Brownell did not file a controverting affidavit. However, the court held a hearing to determine whether it should order a new trial. The court denied the motion for new trial and made express findings of facts and conclusions of law in support of its decision. Gilbert, in his only point of error, claims that the trial court abused its discretion in denying his motion for new trial.

In ***Craddock v. Sunshine Bus Lines,*** the Supreme Court discussed the degree of discretion granted to trial courts in deciding motions for new trial: "[w]hile trial courts have some measure of discretion in the matter, as, in truth, they have in all cases governed by equitable principles, it is not an unbridled discretion to decide cases as they might deem proper, without reference to any guiding rule or principle." ***Craddock,*** 133 S.W.2d 124, 126 (Tex. 1939). The court then set out the often-cited, three-pronged test:

> A default judgment should be set aside and a new trial ordered in any case in which the failure of the defendant to answer before judgment
>
> [1] was not intentional, or the result of conscious indifference on his part, but was due to a mistake or accident;
>
> [2] provided the motion for a new trial sets up a meritorious defense and
>
> [3] is filed at a time when the granting thereof will occasion no delay or otherwise work an injury to the plaintiff.

Id.

In determining whether there was intentional disregard or conscious indifference, we must look to the knowledge and acts of the defendant. ***Strackbein v. Prewitt,*** 671 S.W.2d 37, 39 (Tex. 1984). Under ***Craddock,*** the presence of a mistake or accident negates the conscious indifference or intentional failure element of the test. ***Bank One, Texas v. Moody,*** 34 Tex.Sup.Ct.J. 616, 618 (April 18, 1992).

Gilbert claims that he failed to answer because he mistakenly thought the lawsuit was not against him individually, but against Gilbert Walton Enterprises, Inc., the corporate entity which he serves as president. The corporation had filed for bankruptcy prior to Brownell's lawsuit against Gilbert, and therefore he believed that the lawsuit would be automatically stayed. Gilbert also insists that he failed to answer because, at the time, he was experiencing cluster headaches that had required extensive pain medication and hospitalization.

Courts are required to accept as true the uncontroverted allegations of a defendant's affidavit that negate intentional or consciously indifferent conduct. ***Strackbein,*** 671 S.W.2d at 38-39. The question left unresolved by ***Strackbein*** is how must the movant's allegations be controverted? Must the non-movant controvert with his own affidavit before being entitled to a hearing? Or may the non-movant controvert the movant's allegations in the hearing on the motion?

In our case, Brownell did not file a counter affidavit, but the trial court held a hearing on the defendant's motion. Even absent a counter-affidavit, most courts of

appeals have reviewed a trial court's denial of an equitable motion for new trial by considering the evidence adduced at a motion for new trial hearing on the conscious indifference issue to see if the movant's affidavit has been controverted. ***See State Farm Life Ins. Co. v. Mosharaf,*** 794 S.W.2d 578, 584 (Tex. App. – Houston [1st Dist.] 1990, writ denied); ***Jackson v. Mares,*** 802 S.W.2d 48, 50 (Tex. App. – Corpus Christi 1990, writ denied); ***Gotcher v. Barnett,*** 757 S.W.2d 398, 401 (Tex. App. – Houston [14th Dist.] 1988, no writ); ***Royal Zenith Corp. v. Martinez,*** 695 S.W.2d 327 (Tex. App. – Waco 1985, no writ). Therefore, when the defendant's allegations are contested, the trial court must assume the role as fact-finder to determine if the defendant's conduct amounted to consciously indifferent or intentional behavior. The trial court at a motion for new trial hearing has the duty to ascertain the true facts surrounding the default circumstances. ***Stein v. Meachum,*** 748 S.W.2d 516, 517 (Tex. App. – Dallas 1988, no writ). The court is the sole judge of the credibility of a witness and the weight to be given to the testimony; it may choose to believe all, none, or part of a witness' testimony. ***Id.; Royal Zenith Corp.,*** 695 S.W.2d at 330.

The cross-examination of Gilbert at the motion for new trial hearing disclosed facts sufficient to support the trial court's conclusion that Gilbert's failure to answer proceeded from conscious indifference and not from a mistaken belief that the suit was against the bankrupt corporation. The court took judicial notice of prior lawsuits brought against Gilbert which he also failed to answer, although the corporation had yet to file for bankruptcy. There was also evidence that, despite the cluster

headaches, Gilbert was able to prepare and file documents relating to his corporation's bankruptcy proceeding. He had attended and testified at the Section 341(a) bankruptcy hearing during the same period of time that he received the citation for this underlying lawsuit.

The trial court considered all of the evidence before it and determined that Gilbert's failure to answer was a result of conscious indifference, not due to mistake or accident. We conclude that the trial court properly made its determination under the ***Craddock*** guidelines. The trial court did not abuse its discretion in denying Gilbert's motion for new trial.

The judgment is **affirmed.**

BILL BASS
Justice

Opinion delivered May 29, 1992.

(PUBLISH)

I, Carolyn Allen, Clerk *of the Court of Appeals of the Twelfth Court of Appeals District of the State of Texas, hereby certify that the foregoing five (5) pages contain a true and correct copy of the opinion filed in said court on the 29th day of May, 1992 in the following numbered and entitled cause:*

KEN GILBERT D/B/A TYLER ARMATURE WORKS

No. 12-89-00305-CV *vs.*

BROWNELL ELECTRO

on appeal to said court from Smith County, Texas

(SEAL)

WITNESS MY HAND *and the seal of said Court, at Tyler, Texas*

this the 23rd day of March, 1993.

/s/ Carolyn Allen
Carolyn Allen, Clerk

NO. 12-91-00057-CR

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

WILLIE LEE DOUGLAS, APPELLANT	§	*APPEAL FROM*
	§	*THE 123RD*
V.	§	*JUDICIAL*
	§	*DISTRICT COURT*
THE STATE OF TEXAS, APPELLEE	§	
	§	*SHELBY*
	§	*COUNTY, TEXAS*

Appellant, Willie Lee Douglas, was convicted by a jury of aggravated possession of cocaine with intent to deliver[1] that substance. The court assessed his punishment at confinement for forty years.

Appellant presents two points of error. First, he claims the search of a vehicle he was driving was unreasonable under the Fourth Amendment. Second, he argues that the evidence is insufficient to support his conviction. We will first address and sustain his second point of error, reverse the conviction and order an acquittal.

In summary, the underlying facts and circumstances show that near midnight on the evening of February 5, 1990, a blue Ford van driven by Appellant and occupied by three other passengers was stopped on Highway 7 in Center, Texas, by City Police Officer Allen L. Martin.

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[1] Pursuant to TEX. HEALTH & SAFETY CODE ANN. § 481.112(a) (Vernon 1992) (hereinafter "Section 481.112(a)").

Martin testified that he had received a radio message from fellow officer John Sanders, who told him that the blue van had earlier weaved out of its travel lane and crossed the yellow center stripe of a downtown street. After receiving that message, Martin said he drove his patrol car to a position behind Sanders' vehicle, and then at Sanders' request passed Sanders' patrol car and followed directly behind the van for a short distance. Martin testified that he then observed the van "weaving" across the white lines of parking spaces along the city street so he activated his "overhead" lights and stopped the van. After the van was stopped, Martin said he walked up on the left side of the van and Sanders walked up on the right side.

The undisputed evidence reveals that, at that point, Appellant got out of the van from the driver's side door carrying his Louisiana drivers license and a "pink" paper that proved to be a rental agreement on the van from Wray Ford, Shreveport, Louisiana, lessor, to Lucille Whitley, lessee. Martin later testified that Appellant told him Whitley was his girlfriend who had rented the van for him on February 1, 1990. Martin said he asked Appellant at the time of the stop if any other persons were in the van, and that Appellant told him three friends were riding with him. Martin sent Appellant to the rear of the van where Sanders was standing and then Martin approached the van and asked the persons in the van if they had any identification papers. Each person replied no, and Martin testified that one of the three was "fumbling around between the [front and middle] seats." And Martin concluded that this person was trying to hide "something." Martin said he then entered the van,

searched the "map pocket" behind the driver's seat and found a loaded .32 caliber, six-shot revolver. Martin then said he placed Appellant and the other three persons under arrest and read them their "rights." Martin also testified that he personally searched Appellant's person and found a "large amount[2] of cash . . . in [Appellant's] right sock." The undisputed evidence also shows an additional $2,800 was found upon the search of the three passengers, and that Appellant was not intoxicated nor under the influence of cocaine, nor did he have any cocaine or other contraband on his person at the time of his arrest.

Following their arrest, Appellant, his friends and the van were taken by the Officers to the City Jail in Center. The Assistant Police Chief ordered a search of the van, using a drug dog. The animal sniffed about the van, "alerted" at the passenger side sliding door, and at the rear seat of the van. The dog was then taken to the back of the van, placed in the vehicle through the rear door, where the animal again "alerted" on the rear seat. Police Officer Tommy Alvis then entered the van, pulled up the rear seat and found a large bag of cocaine in a "hollow" in the seat cushioning of the rear seat. The bag contained 2.2 pounds[3] of cocaine.

Department of Public Safety Chemist Randall Lee Markle, identified the substance at trial as cocaine, and

---

[2] The evidence shows that $1,200 was found by Martin on Appellant's person.

[3] 1001 grams.

the contraband was admitted into evidence before the jury.

We now address Appellant's second point of error. In response to Appellant's argument that the evidence does not supply sufficient affirmative links between the cocaine and the Appellant, the State contends that the evidence is sufficient to link the Appellant with the cocaine because: (1) appellant admitted (according to Officer Martin's testimony) that his girlfriend "leased the van for him"; (2) Appellant was the only occupant of the van who had a driver's license; (3) Appellant was in possession of the lease agreement; (4) Appellant had been in possession of the van for "at least 5 days"; (5) appellant quickly exited the van when it was stopped, a circumstance testified to by Officer Martin to be "unusual behavior . . . that . . . occurs only if the driver . . . has something to hide"; (6) 2 loaded handguns and "a glass crack pipe" were recovered from the van; (7) appellant was the driver of the van; (8) appellant possessed "a large sum of money concealed in his sock"; and (9) the cocaine had a large value ($70,000) on the street, therefore no one would "inadvertently" leave it in the van, so Appellant had to be aware of its presence.

Recently, in a cocaine possession case, the Court of Criminal Appeals upheld the judgment of acquittal by the Houston First Court of Appeals in circumstances where the defendant was the driver and sole occupant of a motor vehicle and "an unzipped cloth gym bag [was found] on the seat next to him where the [defendant] had been driving." *Humason v. State*, 728 S.W.2d 363, 364 (Tex. Cr. App. 1987). The *Humason* court reasoned that defendant's mere presence "in the vicinity" of a controlled

substance does not support the inference that he knowingly possessed a controlled substance "beyond a reasonable doubt." *Humason,* 728 S.W.2d at 367. That court ultimately held that the "affirmative links between [its] appellant and the cocaine whether considered individually or in combination, failed to eliminate the reasonable hypothesis[4] that appellant was entirely unaware of the presence of cocaine." ***Id.*** The court went on to observe that a person's mere presence" in the vicinity of a controlled substance has never been sufficient to establish joint possession." ***Waldon v. State,*** 579 S.W.2d 499, 501 (Tex. Cr. App. 1979).

The Court of Criminal Appeals in ***Humason*** concluded that the State failed to satisfy its burden of proof to establish that the Appellant "intentionally or knowingly exercised actual care, custody, control or management over [the cocaine]." ***Humason,*** 728 S.W.2d at 365; ***see also,*** Section 481.112(a) and ***McGoldrick v. State,*** 682 S.W.2d 573, 578 (Tex. Cr. App. 1985).

Moreover, in this case, while the court abstractly charged the jury on the law of parties (see transcript page 69), the paragraph of the charge applying the law to the facts in this case, reads:

> Now, bearing in mind the foregoing instructions, if you find and believe from the evidence beyond a reasonable doubt, that the defendant Willie Lee Douglas, on or about the 6th day of February, 1990, in Shelby County, Texas, did

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[4] Since the instant case was tried before the decision in ***Geesa v. State,*** 820 S.W.2d 154 (Tex. Cr. App. 1991), the reasonable hypothesis analysis is applicable.

> unlawfully, knowingly or intentionally possess with intent to deliver a controlled substance, namely, cocaine, in an amount by aggregate weight including any adulterates or dilutants of four hundred grams or more, then you will find the defendant guilty of unlawful aggravated possession with intent to deliver a controlled substance as charged in the indictment.

Because of the peculiar facts and circumstances of this case and the charge of the court we may not measure the sufficiency of the evidence here under the law of parties,[5] but must determine whether, viewing the evidence in the light most favorable to the verdict, any rational juror could have found each element of the offense beyond a reasonable doubt under the application paragraph of the charge. ***Jackson v. Virginia,*** 443 U.S. 307, (1979); ***see also, Dickey v. State,*** 693 S.W.2d 386, 387 (Tex. Cir. App. 1984).

Since the so called "reasonable-hypothesis-of-innocence analytical construct," ***see Geesa,*** 820 S.W.2d at 165, is to be employed in this circumstantial evidence case, we must determine whether the evidence excludes every reasonable hypothesis other than Appellant's guilt. ***Carlsen v. State,*** 654 S.W.2d 444 (Tex. Cr. App. 1983).

Based on the particular facts of this case we are persuaded that, although the evidence raises a strong suspicion of Appellant's guilt, the same evidence supports as well, the reasonable hypotheses[sic] that the

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[5] *See,* ***Jones v. State,*** 815 S.W.2d 667, 668-669 (Tex. Cr. App. 1991); ***Nickerson v. State,*** 782 S.W.2d 887, 891 (Tex. Cr. App. 1990).

cocaine was possessed by one or more of the three other occupants of the van. Therefore, the finding of Appellant's guilt beyond a reasonable doubt is not a rational finding. ***Carlsen,*** 654 S.W.2d at 449; ***see also, Guiton v. State,*** 742 S.W.2d 5, 9-10 (Tex. Cr. App. 1987).

We sustain Appellant's second point of error, reverse the judgment and order an acquittal.

/s/ Paul S. Colley
PAUL S. COLLEY
Justice

Opinion delivered October 30, 1992.
Tom B. Ramey, Jr., Chief Justice, concurring.

I concur in the results in this case. The majority was obligated under eminent precedents to so rule.

Perhaps the time is appropriate for the Legislature to consider an amendment to TEXAS HEALTH AND SAFETY CODE ANN. § 481.112(a), either to redefine possession of controlled substances or to alter the *mens rea* required to impose criminal responsibility without jeopardizing protection for the innocent. Certainly such an amendment could serve to eliminate the daunting task of gleaning circumstances and facts which are affirmative links between the accused and the contraband in cases involving significant quantities of drugs.

TOM B. RAMEY, JR.
Chief Justice
(PUBLISH)

I, Carolyn Allen, Clerk *of the Court of Appeals of the Twelfth Court of Appeals District of the State of Texas, hereby certify that the foregoing seven (7) pages contain a true and correct*

copy of the opinion filed in said court on the 30th day of October, 1992 in the following numbered and entitled cause:

WILLIE LEE DOUGLAS

No. 12-91-0057-CR ***vs.***

THE STATE OF TEXAS

on appeal to said court from Shelby County, Texas

WITNESS MY HAND
and the seal of said Court,
at Tyler, Texas

this the 23rd day of March, 1993.

/s/ Carolyn Allen
Carolyn Allen, Clerk

[SEAL]